United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

ORIGINAL 76-1210

B P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- X

UNITED STATES OF AMERICA, :

Appellee, :

v. :

AL TAYLOR, WILLIAM TUFFER, CHARLES RAMSEY, RUFUS WESLEY, HENRY SALLEY and AL GREEN, :

Appellants. :

- X

On appeal from the United States District Court
for the Southern District of New York

BRIEF FOR APPELLANT AL TAYLOR

JOHN A. CIAMPA
Attorney for Appellant
Al Taylor
785 West End Avenue
New York, N.Y., 10025
Tel. (212) 663-6429

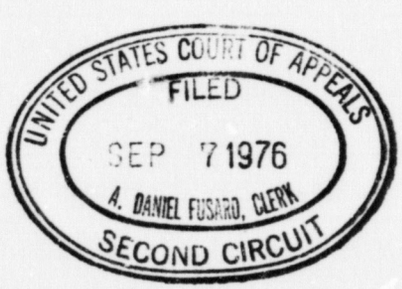

TABLE OF CONTENTS

TABLE OF CONTENTS
(Continued)

TABLE OF CASES

TABLE OF CASES
(Continued)

STATUTES

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- X

UNITED STATES OF AMERICA, :

Appellee, :

v. :

AL TAYLOR, WILLIAM TURNER, CHARLES RAMSEY, RUFUS WESLEY, HENRY SALLEY and AL GREEN, :

Appellants. :

- X

On appeal from the United States District Court
for the Southern District of New York

BRIEF FOR APPELLANT AL TAYLOR

PRELIMINARY STATEMENT

This is an appeal from the judgment of conviction of the defendant-appellant Al Taylor of one count of conspiracy to violate sections 173, 174, 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code, after a jury trial before Judge Kevin T. Duffy. Taylor was charged along with fourteen others and tried along with twelve others, at first, and finally with eleven others, one, Warren Robinson, having been granted a severance during the trial. The case received the nickname Tramunti II in the prosecutor's office since alleged co-conspirators in this case were also named in the Tramunti case (United States v. Tramunti, 513 F.2d 1087, 2d Cir., 1975), and since all the testimony

against this defendant came from informants who were also used in Tramunti (supra).

After conviction, Taylor was sentenced to eight years in prison with the mandatory parole period.

Taylor was indicted on November 18, 1975 (Indictment 75 Cr 1112) for acts said to have occurred in March and April of 1971.

Of the twelve defendants tried in this case, one was acquitted, the jury was unable to reach a verdict on four, and seven were convicted.

QUESTIONS PRESENTED

I. In a large scale narcotics conspiracy, where the evidence and indictment indicate that one defendant, Taylor, received two ounces of drugs, did the trial court err in denying the Rule 29 motion to dismiss before sending the case to the jury?

II. Where it appears that a co-defendant, Robinson, the only one with whom conspiratorial contact is charged, has been severed having exculpatory testimony to give on behalf of Taylor but unable to give it until after his own case had been disposed of because of Fifth Amendment rights, did the trial court err in denying Taylor's motion for severance?

III. Where defendant Taylor had been made to rest and not allowed to reopen his case, and where the printed minutes indicated testimony on which defense relied in calling and preparing witnesses and where the trial court previously denied the

Government's application to change the transcript, did the trial court err in finally allowing the Government's request to change the minutes, and instructing the jury of the change during the defense's summation?

IV. Did the trial court err in granting only a two day continuance where defendant Taylor had been jerked out of a removal proceeding in Washington with other counsel and brought to trial in New York with only a Saturday for one visit with new counsel before the trial on Monday?

V. Did the trial court err in countermanding its own order thereby forcing defense to rest without the production of a witness who was ordered to be produced who was in Government custody and was requested several times by defense?

VI. Did the trial court err in denying defendant's motion for a more convenient forum where all the acts attributed to the defendant in the indictment occurred in Washington, D.C. where all the witnesses were from Washington, D.C., where the majority of the codefendants were from Washington, D.C., and where the defendant himself was from Washington, D.C.?

VII. Did the trial court err in denying defendant's motion as to misjoinder where defendant Taylor who was charged with no substantive counts was prejudicially joined with co-defendants with whom he was never linked?

VIII. Did the trial court err in denying defendant's motion for mistrial on the grounds that during the trial members of the jury repeatedly saw Taylor and four others in manacles whom

they eventually convicted while they saw others roaming free, whom they did not convict?

THE INDICTMENT: CHARGES AGAINST TAYLOR

Indictment 75 Cr 1112 filed November 18, 1975 to supersede indictment 75 Cr 788 in the United States District Court, Southern District of New York, contains 14 counts, charging Taylor with only Count One, a conspiracy count containing 37 overt acts.

Taylor is mentioned in Count One's Overt Acts numbered 1, 2, 33, and 34.

Overt Act number 1 was stricken by the trial court for complete failure of the evidence to support the allegations contained therein.

Overt Act number 2 alleges a meeting between Taylor and the severed co-defendant Warren Robinson which took place in April, 1971 in Washington, D.C. N.W. on 12th and U Streets.

Overt Act number 33 charges that in July, 1972 Taylor "received approximately one ounce of heroin from co-conspirator Warren Robinson" (severed at trial) "in an alley in the vicinity of 12th Street and Maryland Avenue, N.W., Washington, D.C."

Overt Act 34 charges that "in or about September 1972, the defendant Al Taylor received approximately one ounce of heroin from co-conspirator Warren Robinson, aka 'Alan' in the vicinity of Mt. Pleasant Street and Park Road, N.W. Washington, D.C."

FACTS ADDUCED AT TRIAL

At the trial the only testimony against the defendant Taylor came from Tennessee Dawson, a defendant in the Tramunti case (supra) who pleaded guilty and had yet to be sentenced, and James "Bubbles" March, a co-conspirator in the instant case, who likewise had pleaded guilty and was yet to be sentenced.

Dawson testified that he overheard a conversation between Taylor and Warren Robinson (the severed co-defendant) on 12th and U St. Northwest, wherein Taylor excused his nonpayment for an unspecified, undated, unweighted delivery of narcotics (T. 112-113; JA-136/137).* There is no testimony to indicate that this meeting had to do with conspiracy narcotics.

March testified that he saw Taylor in September 1971 (T. 1018; JA-115) (later changed to read 1972) at which time Taylor asked for Robinson. Later Robinson and March went to see Taylor at the top floor of an apartment house on Mt. Pleasant where Robinson sold Taylor an ounce and a half. The indictment charges that this delivery was one ounce. After the transaction March had a conversation in which Robinson indicated that Taylor was a bad payer, that Robinson had given him as much as an eighth of dope in the past but had to cut him down (T. 1020-1022; JA-142-143). March could not say whether the "eighth of dope" was conspiracy narcotics, that is whether it was within the period during which

---

* References to the Transcript are T. followed by a page number; to the Joint Appendix are JA- followed by a page number.

the conspiracy took place. March stated that he had no idea when such a transaction was to have occurred (T. 1098; JA-153).

March testified to a second delivery of narcotics to Taylor which took place sometime in the summer of 1972 at 12th St. Northeast wherein March was instructed by Robinson to get an ounce of dope from the stash which he did, and then came to a waiting car and laid the ounce at Taylor's feet, to which Taylor responded "that wasn't necessary" (T. 1003, 1004; JA-140,141). March testified to no other deliveries or conversations.

Dawson never witnessed any deliveries only the conversation mentioned above, and also another occasion when he saw Taylor with Freddie Scott the "test junky" and Taylor pleaded with Dawson to let him get down, since Robinson wouldn't let him have any narcotics (T. 257, JA-133).

Defense witness Goldring, the landlord of the Mt. Pleasant St. apartment building, testified that during the time of the alleged delivery of narcotics to Taylor, at that address -- "September 1971" as originally in Transcript p. 1018 -- he did not live on the top floor, but rather in the basement apartment.

ARGUMENT

POINT I

WHERE THERE WAS NO EVIDENCE OF KNOWLEDGE, INTENT OR PARTICIPATION IN THE CONSPIRATORIAL OBJECTIVE TO DISTRIBUTE NARCOTICS, THE RECEIPT OF APPROXIMATELY TWO OUNCES OF NARCOTICS IS NOT ENOUGH TO WARRANT THE PRESUMPTION OF KNOWLEDGE. HENCE THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTIONS TO DISMISS AS A MATTER OF LAW.

Since there was no evidence of Taylor's knowing participation in the conspiracy, i.e. that he promoted the aims of the conspiracy, profited personally from the conspiracy, made the aims of the conspiracy his own, or even knew about the existence of the conspiracy, the only conduit through which the case could proceed to the jury was that gaping net, the presumption applied in narcotics conspiracy cases to the effect that traffickers in large amounts of narcotics are presumed to know. United States v. Borelli, 336 F.2d 376 (2d Cir.).

But this Court has sought recently, indeed in the very sister case to this one, to limit the use of the presumption, lest it be extended to include every addict in the street in one conspiracy with all the large scale manufacturers and distributors. In United States v. Tramunti, 513 F.2d 1087 (2nd Cir., 1975), this Court used as a test for whether the presumption should apply to a particular defendant, the amount of conspiracy narcotics flowing to that particular defendant. Applying that test to one Alonzo Ware, this Court held that the purchase of two ounces was not enough participation for the presumption to apply. That clear,

close at hand mandate should have been applied to Taylor by the trial court. The point was raised in Taylor's rule 29 motions, which were denied. Taylor is in the same, if not a better, position, than Ware to receive the benefits of the Tramunti exclusion.

Ware, like Taylor, had previous narcotics dealings, and like Taylor he purchased two ounces of conspiracy narcotics. Unlike Taylor, Ware paid for the narcotics, indicating that he would resell them, that is, that he had no intention of using any part of the narcotics, but rather would resell them and "get rolling again" as he put it. Tramunti, supra, p. 1112.

In Taylor's case the strong inference is that he might have used or given away some or all of his two ounces together with his girl friend and/or other friends. Dawson testified that he didn't know of any of Taylor's distributors (T. 301; JA-138) and that Robinson told him Taylor had not paid for part of the narcotics (T. 110; JA-134) and that Taylor might be a junkie (T. 332; JA-139), and that on one occasion during the period of the conspiracy Taylor was with Freddie Scott (T. 256-7; JA-132-3) the addict on whom samples of the narcotic were tested for toxicity and potency and at that time Taylor pleaded with Dawson for some narcotics, "Man why don't you let me get down, why don't you let me have some narcotics" (T. 257; JA-133). Dawson referred Taylor to Robinson, whereupon Taylor explained that Robinson wasn't letting Taylor have anymore narcotics. Apparently Taylor was not very business-like in the use he made of his ounces since he had no profit from redistribution, or perhaps had used up the merchandise,

as it were. Added to this is the fact that when Taylor was arrested on these charges he was in an addiction treatment center.

The law must be applied consistently, at least, to defendants in sister conspiracy cases. To allow Ware to wriggle free as a matter of law, and hold Taylor would be a glaring inconsistency.

It is not the number of contacts which entitles or bars a defendant from the so-called "single act" line of cases. This Court has made it clear that it is the quality and the quantity of the participation which must be taken into account.

> "the qualitative nature of the act or acts constituting the single transaction (purchase delivery or the like) viewed in the context of the entire conspiracy". (Emphasis supplied) Tramunti, supra, p. 1112; United States v. Torres, 503 F.2d 1120, 1124 (2d Cir 1974)

In the case of Alonzo Ware and his two ounces plus his confessed intent to redistribute, this Court held in Tramunti, supra, at page 1112:

> "Viewed in the entire context of the conspiracy his act qualitatively is minuscule. True he indicated that he had been a dealer before and that he wanted to start dealing again, . . .
>
> "When the government throws out its big conspiracy net to catch the big fish in the criminal sea, it has to be made aware that an occasional minnow may wriggle free."

If Ware can wriggle free from essentially the same net, then Taylor must wriggle free as well, if the law were properly applied by the trial court.

POINT II

THE COURT ERRED IN DENYING TAYLOR'S MOTION FOR SEVERANCE, WHERE THAT DENIAL MADE IT IMPOSSIBLE FOR TAYLOR TO OBTAIN THE EXCULPATORY TESTIMONY OF CO-DEFENDANT ROBINSON.

The only drugs Taylor was said to have received was from Robinson. As was stated above, Robinson was severed during the jury selection process. Robinson stated through his attorney and at a hearing before the court, out of the presence of the jury, that he had exculpatory testimony to offer on behalf of Taylor and three others, and that he would not be able to offer it at this trial because his testimony might be self-incriminating in the subsequent trial where he would be facing the same charges (T. 34, 35, 3126-3131, 3530, 3095; JA-125,126,130,131,161,129). If Taylor's severed trial were scheduled for some time after the charges against Robinson had been disposed of, Taylor might not have been convicted, since Robinson would testify, having no further need of the Fifth Amendment protection, that Taylor never bought any narcotics from him during the period of the conspiracy and that he never told Dawson or March that Taylor had ever purchased narcotics from him (T. 3082, 3083; JA-127,128). To a large extent the evidence against Taylor was hearsay, based upon what Robinson was supposed to have told Dawson and March about Taylor. How could this be considered a fair trial for Taylor when that hearsay is left unchallenged, whereas had Taylor been tried after Robinson, the sole evidence against him would have been shaken from its roots by Robinson's contradiction.

Robinson had nothing to gain by offering this testimony, unlike Dawson and March who were making every effort to cooperate with the Government prior to receiving their sentences. Robinson did not offer to exculpate all of the co-conspirators, as he might have done had he been acting out of some fear or loyalty to his former compatriots. The fact of the matter is that the very reason for his, Robinson's severance was that his defense was going to bury, that is, be harmful to most of the other co-defendants (T. 44, JA-168 ; T. 71, JA-169 ; T. 202, JA-171).

In United States v. Finkelstein, 526 F.2d 517 (2d Cir. 1975), at 523, 524, this Court suggests four tests to determine whether Taylor's severance should have been granted:

1) the sufficiency of the showing that co-defendant would testify at a severed trial and not assert his Fifth Amendment privilege;

2) the degree to which the exculpatory testimony would be cumulative;

3) the counter-arguments of judicial economy;

4) the likelihood that the exculpatory testimony might be subject to substantial damaging impeachment.

First, there can be no more sufficient showing that the co-defendant would testify than the representations of his counsel and the sworn statements that he himself made to the court (T. 3530, 3095, 3082, 3083; JA-161,129,127,128).

Second, by no stretch of the imagination could one conclude that this exculpatory testimony would be cumulative, there being nothing else like it in the record.

Third, it was not considered a burden on the judicial economy to grant Robinson's severance for negative reasons, i.e., so that he would not hurt the other co-defendants by his testimony. How can the same trial court reason that Taylor's severance motion, made for positive reasons, i.e., so that he could avail himself of exculpatory testimony, should not be granted for reasons of judicial economy. As it now stands if Taylor were given another trial in which he could avail himself of Robinson's exculpatory testimony there would be no additional trials necessary: a separate trial for Robinson was already made necessary by the trial court's order; after that, another trial will be held in which the co-defendants Barber, Miller and Smith, (in whose cases the jury was unable to reach a verdict,) would be joined with Taylor. At that trial Robinson could freely offer his exculpatory testimony. It is interesting to note that Robinson stated he had exculpatory testimony to offer on behalf of Barber, Miller, Smith and Taylor; of the four only Taylor was convicted, the others will have to be retried and presumably will have the benefit of Robinson's testimony. Only Taylor suffers from the trial court's denial of the severance motion.

Fourth, there is little likelihood that the exculpatory testimony would be subject to substantial damaging impeachment. In a trial where the few pages of testimony against Taylor was mostly hearsay from cooperating individuals nervously awaiting the consideration for their cooperation, i.e., a lenient sentence, and where both those individuals had long criminal records,

Robinson's veracity by comparison as a contradicting witness would then have been as bushel to thimble. The fourth prong of this test can be extended into the realm of sheer speculation. Appellant confesses that this argument about what would have happened if Robinson had testified, is to some extent conjecture; the same must be said of any counter-arguments. The important thing is that there is nothing predictable now, or that was brought up at trial by the Government which would suggest "damaging impeachment".

In this connection the Seventh Circuit has held in United States v. Echles, 352 F.2d 892 (7th Cir 1965) at page 898, ". . . a fair trial for Echles necessitated providing him the opportunity of getting the Arrington (exculpatory) evidence before the jury, regardless of how we might regard the credibility of the witness or the weight of his testimony". That opportunity has been denied Taylor, depriving him of a substantial right, guaranteed by the Constitution.

POINT III

THE TRIAL COURT ERRED IN DENYING TAYLOR'S MOTION TO REOPEN HIS CASE WHERE GOVERNMENT REQUESTED PREJUDICIAL CHANGE IN THE PRINTED TRANSCRIPT AFTER TAYLOR HAD BEEN MADE TO REST; AND FURTHER ERRED IN HIGHLIGHTING THE TRANSCRIPT DISCREPANCY DURING TAYLOR'S SUMMATION AND UPON ANSWERING A QUESTION FROM THE JURY SENT OUT DURING DELIBERATION.

In the Government's direct case at page 1018 (JA- 115) the witness March was asked:

"Q. Directing your attention to September 1971, thereabouts, did you have occasion to see Al Taylor?

"A. Yes, I did.

"Q. Where?

"A. Mount Pleasant Street, Park Row.

"MR. CIAMPA: May I have the question before this one read back. . . ."

Following on the overt acts listed in the indictment trial counsel apparently heard a discrepancy between the September 1972 date listed in the indictment and the September 1971 date stated in the testimony. Later (T. 3533; JA-162), a motion was made to strike the Overt Act because of the one year variance in the testimony. Motion was denied.

This delivery of an ounce and a half of heroin was supposed to have been made to Taylor and his girl friend at their top floor apartment on Mt. Pleasant St. (T. 1019, 1020; JA-116,117).

In preparing Taylor's defense, counsel subpoenaed a representative from the landlord company -- Mrs. Goldring, and all the records relating to where Taylor and his girl friend lived in September 1971, relying on the date counsel heard and the date that was printed in the transcript. Mrs. Goldring testified that based on her records in September 1971, Taylor and his girl friend lived in a basement apartment at Mt. Pleasant St. (T. 3333; JA-118).

After the defense was made to rest, the Government requested a change in the printed transcript, changing the date

of that one delivery (the largest portion of the evidence against Taylor) to September 1972. Whereupon Taylor moved for leave to reopen so that the witness Goldring could be called back with records covering the period of September 1972, if there were any, and asked directly about that period. The trial court indicated it was not sure whether the minutes would in fact be changed (T. 3582,3584; JA- 154,119).

In the middle of co-defendants' summations Taylor was warned that the minutes may be changed since there was a discrepancy with portions of the reporter's notes; again Taylor moved for leave to reopen his case, and again the motion was ignored and effectively denied. But still even at this point on the eve of his summation counsel for Taylor had no clear indication about whether or not the rug he wished to stand on in his summation was to be pulled out from under him, that is, whether the record he wished to read from regarding the Mt. Pleasant St. delivery was to be changed. "Let me think about it" said the trial court (T. 3781; JA-120).

Finally in the middle of Taylor's defense summation where counsel sought to impeach March's credibility about the September 1971 delivery to a top floor apartment at Mt. Pleasant St. which turned out to be in the basement, the Government objected to defense counsel fixing the date of the delivery according to the printed transcript as September 1971:

> "MR. ENGEL: Objection. That is not what the record says." (T. 4018, 4019; JA-155,156)

Here the court and the Government effectively forced defense

counsel to discuss the prejudicial discrepancy or look to be completely misstating the testimony. As for the notion that the jury's recollection should govern, that is patently absurd. In a case of this length, where the jury was not allowed to keep notes, the testimony concerning a peripheral defendant which occurred exactly three thousand pages earlier in the trial, no one could be expected to have a recollection of whether a question was as to 1971 or 1972, apparently not even the reporter could be expected to remember, even with his notes.

Hence the first questions from the jury once deliberations were commenced (Court Exhibit 7, T. 4198; JA-167) concerned the prejudicial discrepancy. Here once again the trial court vacillated, stating "I am not going to change it" (T. 4206; JA- 121) and then "It's going to read the way it's written, and then I'm going to comment on it" (T. 4212; JA-122), which is like saying it shall remain pure white except for a little touch of black. In the end the trial court answered the jury's question by highlighting the prejudicial discrepancy, mentioning that the transcript which defense counsel read as September 1971, might have been contradicted by the court reporter's actual notes which indicated 1972, but after all it was not up to the court to rule on this; it was up to the jury's independent recollection, a recollection which they could not possibly have regarding that milisecond where someone said "one" or "two," weeks and weeks earlier (T. 4213, 4214; JA-123,124). The jury undoubtedly relied on the reporter's notes dignified by the court's instruction. The

damage had been done, Mrs. Goldring's testimony regarding September 1971 was rendered useless, and Taylor had no opportunity to call her back.

POINT IV

THE TRIAL COURT ERRED IN GRANTING ONLY A TWO-DAY CONTINUANCE FOR TAYLOR'S TRIAL COUNSEL TO PREPARE.

Taylor was represented by other counsel in a removal proceeding hearing in Washington, D.C. (JA-176) when suddenly he found himself in the Southern District of New York on Saturday, January 24, 1976; then for the first time he met his newly appointed trial counsel during a family visiting hour in a crowded visitation room in the Metropolitan Corrections Center. The following Monday the trial began with such haste as to Taylor that it now appears he never entered a plea as to indictment 75 Cr. 1112. All of the facts concerning the case against Taylor and all of the possible defense witnesses were in Washington. A mountainous transcript of previous testimony of the government witnesses who would be testifying against Taylor was presented to counsel, as well as complex legal questions regarding pre-trial motions. Whereupon trial counsel requested a one week continuance (T. 12; JA-11B. It must be pointed out that all of the eleven co-counsel had much more than a week prior to trial. The trial court granted a two-day continuance (T. 22; JA-114).

Trial counsel chose to use the two days visiting Taylor

at MCC and reviewing the enormous Tramunti transcript. No investigation was accomplished regarding the locations and times of the two alleged deliveries. It turned out later at trial that one of the alleged intersections mentioned in the indictment was improperly placed in the Northwest section of Washington, D.C. (T. 1003; JA-140); and as to the other -- the Mt. Pleasant apartment where Government witness March claims he witnessed the other delivery -- was said to be on the top floor, while Taylor and his girl friend lived in the basement. The credibility of this witness could have been severely shaken if counsel had time to investigate in this other city, if photographs were taken, if other witnesses could have been located to contradict the shakable testimony of March.

Again citing this Court's opinion in the sister case Tramunti, supra, pp. 1116-1118, appellant realizes that no standard was set there as to time for new counsel to prepare. However, in the instant case which must be said to be an even more complex conspiracy since all that had gone before in Tramunti was of necessity included, the spirit of the ruling should have caused the trial court to grant the week's continuance, so that Taylor had a prepared defense, and so that his Sixth Amendment rights could be more than perfunctorily complied with.

POINT V

THE TRIAL COURT ERRED IN FORCING THE DEFENDANT TAYLOR TO REST WITHOUT THE PRODUCTION OF A MATERIAL WITNESS WHO WAS IN GOVERNMENT CUSTODY, WHO HAD BEEN REQUESTED SEVERAL TIMES, PROMISED SEVERAL TIMES, ORDERED TO BE PRODUCED SEVERAL TIMES.

Taylor asked the court and the Government early in the trial for Cornelius Garner, also known as Moochie (T. 214-215; JA-172,173). At that time Garner was at the MCC in New York (T. 3543, 2624, 3427; JA-163,108,111). Later in the trial Taylor renewed his request for Garner at which time the Government stated that it was uncertain of the whereabouts of Garner but thought that Garner might be in the federal reformatory in Petersburg, Virginia (T. 2624-2625; JA- 108,109). Still later in the trial the Government informed the court that arrangements were being made to fly Garner up from Atlanta (T. 3279; JA-107) and that Garner was originally scheduled to arrive on the previous Wednesday, that being the following Friday (T. 3424, 3427, 3462, 3469; JA-110,111,112,160).

The first time Garner was requested the trial court assured Taylor that Garner would be produced (T. 214, 215; JA-172,173) and later the court issued a writ (T. 3427-JA-111; see also J.A. 174-5) and then renewed the writ: "I will make renewed writs or affidavits for Cornelius Garner..." (T. 2628; JA-106).

After five or six requests, after orders and promises by the trial court and the Government, Garner was not produced, and no one knows why. Surely Taylor cannot be blamed for this failure.

Garner was in Federal custody being bounced around from Petersburg to Atlanta (loc. cit.). Is the Federal corrections system such a maze that a prisoner can be lost to a Federal court order; or were there other reasons for Garner not being produced? Taylor never had time to find out.

"You have rested whether you like it or not" the trial court ruled (T. 3478, 3479; JA-158,159). Taylor asked for leave to reopen and for a continuance pending the production of Garner (T. 3543, 3544; JA-163,164), which was denied.

How can Taylor be said to have had a fair trial? First there was so little time in which he could locate any witnesses, compounded by the failure of the Government to make the witnesses available despite promises and orders. Clearly we never heard Taylor's side of the story within the meaning of the Sixth Amendment.

In Washington v. State of Texas, 388 U.S. 20, 87 S.Ct. 1930 (1967) at page 1923 the Supreme Court held:

> "The right to offer testimony of witnesses and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecutors' to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecutor's witnesses for the purpose of challenging their testimony he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law."

Again in Faretta v. California, 422 U.S. 806 (1975) at page 818, the Supreme Court restated its position that the right to have compulsory process for obtaining witnesses in the

defendant's favor -- one of the basic rights guaranteed by the Sixth Amendment -- is also part of "due process of law" guaranteed by the Fourteenth Amendment. In short it is a right which is just as fundamental as the right to cross-examine adverse witnesses. If through some action on the part of the Government and the pressure on the trial court to conclude a lengthy trial, the defendant was precluded from conducting cross-examination of the witnesses against him, would there be any question that fatal error had been committed, that the defendant had been denied rights guaranteed by both the Fourteenth and the Sixth Amendments? The same importance must be attached to the fundamental right to compulsory process for obtaining favorable witnesses.

The Government's omission had the same effect as the commission of interference with the defendant's compulsory process. The defendant could do no more than he did. Court orders and writs were issued for the production of Garner.

In Velarde-Villarreal v. United States, 354 F.2d 9 (9th Cir. 1965), where the witness was not in Federal custody but may in fact have been sent out of the country, the Court remanded the case to the trial court for a hearing during which the Government would have the burden of proving that it was genuinely unable through reasonable effort to produce the witness; failing that, the defendant would be entitled to a new trial. In the instant case how could the Government be said to be genuinely unable through reasonable effort to produce Garner who was

admittedly in Federal custody and who was brought up by this very prosecutor to New York for questioning just before the trial (T. 318; JA-105).

In United States v. Tsutagawa, 500 F.2d 420 (1974) (9th Cir.) the Government was held responsible for deporting illegal aliens when they had only the dim prospect of becoming defense witnesses. The Court said at page 423:

> "A defendant has the right to formulate his defense uninhibited by government conduct that, in effect, prevents him from interviewing witnesses who may be involved and from determining whether he will subpoena and call them in his defense."

The rule in this case would not require that the defendant know in advance that the witness's testimony be crucial or even important. This case holds that the defendant should have had the right to interview the witness to decide the importance of the testimony for himself.

In the instant case, the testimony of Moochie-Garner was thought to be crucial, especially in light of the fact that the Government brought him to New York (T. 318; JA-105), defense surmises, to corroborate the testimony of his former associate Tennessee Dawson, and in fact Moochie-Garner contradicted, or at least failed to corroborate that Government witness. The Government must have known that Garner, a Federal prisoner, was brought to New York, they must have known why he was brought to New York, they must have known why he was sent away, and they must have known where he was sent. These are inescapable conclusions.

The trial court erred in ignoring its own order compelling the Government to produce Garner, and forcing the defendant to rest without hearing from Garner.

POINT VI

WHERE EACH AND EVERY OVERT ACT CHARGED AGAINST TAYLOR IN THE INDICTMENT, THE MAJORITY OF THE CO-DEFENDANTS AND POSSIBLE DEFENSE WITNESSES WERE ALL LOCATED IN WASHINGTON, D.C., TAYLOR'S RESIDENCE, THE TRIAL COURT ERRED IN DENYING TAYLOR'S MOTION FOR A MORE CONVENIENT FORUM.

In Platt v. Minnesota Mining and Manufacturing Co., 376 U.S. 244, 84 S.Ct. 769 (1964), the Supreme Court dealt with a motion under Rule 21(b) of the Federal Rules of Criminal Procedure which provides that where it appears an offense was committed in more than one district and the court "is satisfied that in the interest of justice the proceedings should be transferred" to another district, the court shall upon motion transfer the case. In Platt the Supreme Court reversed the Court of Appeals order transferring the case for reasons that do not apply to the case at bar. In the case at bar, the particular crime of conspiracy as it relates to the defendant Taylor did not occur "in more than one district"; it occurred in only one district, namely Washington, D.C. and the grounds for the motion go beyond mere convenience.

In United States v. Hinton, 268 F. Supp. 728 (D.C. LA 1967), that Court distinguished a mere inconvenience and an injustice,

i.e., a deprivation of due process, which places a different duty on the trial court in connection with such a transfer. In United States v. Phillips, 433 F.2d 1346 (CA Mo 1970) at page 1368, the Court considers Rule 21(b) motions on appeal as having the additional burden of Rule 52(a) of the Federal Rules of Criminal Procedure:

> "The question of transfer under Rule 21(b) 'for the convenience of the parties and witnesses and in the interest of justice' is one involving realistic approach, fair consideration and judgment of sound discretion on the part of the district court. Where such a motion has been denied and trial has been had, a party, to be entitled to a reversal, must assume the burden under Federal Criminal Rule 52(a) of demonstrating that some substantial right has actually been affected."

Even applying this most stringent test to the issue, Taylor's motion on appeal stands up. The "substantial right" affected in Taylor's case was graphically demonstrated in the argument under "POINT III". Had the case been tried in Washington, Mrs. Goldring could have been called back with the appropriate records and the trial court would only have to delay the trial for a few minutes to put her back on the stand and ask her directly about September of 1972. Other witnesses avoided subpoenas rather than undergo the hardship of traveling and staying overnight in a strange city. The first substantial right affected here is the right to call favorable witnesses under the Sixth Amendment.

The second right affected was the right to counsel. Taylor had a lawyer in Washington who was already representing

him in connection with a removal proceeding; he wished this lawyer to continue his representation but it was impossible for that lawyer (Farquar) to handle the case in New York. As sub-argument under this same point one might say that Taylor's New York assigned counsel was unable to accomplish sufficient investigation and preparation, and very well might have if the locations and witnesses were not in another city. Also Washington counsel might have more readily spotted discrepancies in testimony.

The third right affected relates to the jury. This particular jury was totally unfamiliar with the city in which all the testimony as to Taylor took place; they might have been better judges of the facts had they been a Washington jury. For instance they might have been able to judge for themselves whether the location in the Overt Act was in the Northwest section as the indictment indicates or in the Northeast section as the testimony indicates.

These arguments are true for the majority of the defendants joined in this indictment, several of whom were on bail and had to bear the additional costs of finding hotel accommodations for the ten or more weeks involved in these proceedings.

It is clear that substantial rights were affected by the trial court's denial of Taylor's motion under Rule 21(b), sufficiently affected so as to meet any additional burden imposed by Rule 52(a).

At trial, counsel mentioned the substantial rights as

the basis of the motion for transfer (T. 1070-1074; JA-100-104); the court indicated that timeliness was the basis of its decision.

"THE COURT: No, we have gone too far down the path on this one." (T. 1072; JA-102).

If substantial rights were involved and if, as was the case, Taylor could not get a fair trial under the circumstances, timeliness should not have decided the issue, especially where Taylor's trial counsel had been appointed so late in the game. The fact is that the issues raised by that motion are still to this date not untimely because of the substantial rights involved. The trial court's reasoning and its denial of the motion for transfer was error.

POINT VII

THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTIONS AIMED AT THE MISJOINDER OF TAYLOR IN THIS PARTICULAR INDICTMENT AND TRIAL.

The misjoinder point is preserved for appeal by the trial court's denial of several motions at the outset (T. 74; JA-170), during and at the end of the trial. Since Taylor is, by the trial court's pre-trial ruling, deemed to have joined in all motions made by co-defendants, it can be said that the misjoinder point was preserved in the denial of the motions by Smith, Ramsey and Miller at the beginning of the trial and in the Rule 29 motions made by Taylor and others, but specifically, during the trial, by the denial of motions aimed directly at misjoinder made by Taylor and others (T. 2586,2587; JA- 165,166).

Taylor's substantial right to have his guilt or innocence individually considered without the effect of spill-over of unrelated evidence against co-defendants was denied even though there was nothing to link Taylor's transaction with the New York "Tramunti" part of the conspiracy.

March is the only witness who gave testimony as to the Taylor transactions, and there is nothing in his testimony that would link Taylor's transactions with Robinson's transactions in New York. Quite to the contrary, March testified:

"Q. Do you know whether Al Taylor ever went on any of those trips to New York with Warren Robinson?

"A. No I don't.

"Q. Was he ever along when you went to New York to pick up kilos of heroin?

"A. No he wasn't.

"Q. Did you ever hear Warren Robinson say that Al Taylor had gone to New York to pick up narcotics?

"A. With Warren?

"Q. Did Warren ever tell you that?

"A. No he didn't."

(T. 1096, 1097; JA- 151,152).

Later, responding to the Government's leading questions on redirect, March changes his testimony to the effect that he now recalled that Robinson had told him that Taylor had come to New York, but there is no testimony about any drugs (T. 1255; JA- 146). A moment later on recross March denies having any knowledge of Taylor being along on any trips to New York with

Robinson, and then goes through a list of ayes and noes to explain away the answer he gave to the Government's question, but in the end, with all the vacillation, clearly the "noes" have it (T. 1267-1270; JA-147-150).

None of the witnesses who testified about Robinson -- Taylor's only contact -- joining the New York "Tramunti" conspiracy knew anything about the Robinson-Taylor transaction in Washington. There is, in fact, absolutely nothing to link Taylor's Washington transaction with Robinson's participation in the New York Tramunti conspiracy. Are we to infer without there being any proof beyond a reasonable doubt that Warren Robinson could not have had any other narcotics sources other than the New York connection in the four years charged in the indictment? Taylor knew nothing of the New York contingent, nor did they know of him. Panirello didn't know Taylor (T. 2183; JA- 144), and neither did Provitera (T. 2574; JA-145). Appellant realizes that he need not have known any of the New York contingent personally, but neither is he required to prove his lack of connection; it was for the Government to establish some link, and they failed to do this, except by wild inference. The only justification for subjecting Taylor's tiny transaction to a trial of this magnitude would be if somehow he were linked to the New York operation, and his relationship with Robinson alone is not enough. So it was stated by this Court in United States v. Bertolotti, Dkt No. 75-1107 (2d Cir., November 10, 1975) Slip Op. 6409, at page 6419:

> "Our examination of the evidence reveals a sufficient basis for the jury to be satisfied beyond a reasonable doubt that each of the asserted transactions took place, but no evidence linking them together in an overall conspiracy. [Cases cited] Indeed the only common factor linking the transactions was the presence of Rossi and Coralluzzo. This type of a nexus has never been held to be sufficient."

Long before the joinder question was raised by defendants it was on the prosecutor's mind. In his memorandum of law answering unrelated pretrial motions on venue, he says at page 17:

> "The Court may further expect motions for judgments of acquittal at the close of the Government's case on the ground that the Government will have proven multiple conspiracies as a matter of law [citing Bertolotti, supra). These motions may only be intelligently decided against the background of the Tramunti proof, a matter which the Court is uniquely able to appreciate. Because decisions on these questions will be demanded, venue is much more appropriate and judicially sound in New York than in the District of Columbia."

Let us take Bertolotti then if that is the reason the Government gave for our staying in New York. How is the defendant prejudiced by misjoinder in such a conspiracy case? Let us, with Bertolotti (supra), count the ways:

1. The confusion resulting from a lengthy trial.

> "In Miley, however, only nine persons were indicted, and only five of these proceeded to trial. The Miley trial lasted only five days; the instant case took nearly four weeks to try." (at page 6423)

The Taylor case, at bar, had twelve defendants and took more than twice as long as Bertolotti.

2. The possibility of spill-over.

> "The possibilities of spill-over effect from testimony on these transactions are patent when the number of

> conspiracies, the number of defendants and the volume of evidence are weighted against the ability of the jury to give each defendant the individual consideration our system requires."

A glaring example of spill-over was the subject of the motion cited above (T. 2586, 2587; JA-165,166), where the Government sought to introduce evidence of state crimes of violence, and did introduce some evidence of these crimes and then introduced a large volume of non-conspiracy narcotics under the theory of a prior similar act against Basil Hansen, with whom neither Taylor nor Robinson had the remotest connection. The same is true with respect to an inflammatory display of non-conspiracy drugs offered against the defendant Smith. Taylor was not indicted on any substantive count and suffered certain prejudice from the quantities in these displays. As he did from all of the evidence that was received about the New York Tramunti gang, Butch Pugliese, Pauly The Arrow, shot in the knee, none of it having anything whatsoever to do with the transaction Taylor was alleged to have been involved with in Washington. This is worse than the Peter Mengrone wiretaps about which the Bertolotti Court said at page 6425:

> "No defendant ought to have a jury which is considering his guilt or innocence hear evidence of this sort absent proof connecting him with the subject matter discussed."

For reasons of its final decision the Bertolotti language cannot be cited here as holding, but nevertheless it is persuasive, especially in light of the fact that this case presents a much stronger example of prejudice of substantial

rights of a defendant by misjoinder.

Language which is, however, "rational" and lucidly eloquent, is found in Kotteakos v. United States, 328 U.S. 750, 66 S.Ct. 1239 (1946) at page 1252:

> "Criminal they may be, but it is not the criminality of mass conspiracy. They do not invite mass trial by their conduct. Nor does our system tolerate it. That way lies the drift toward totalitarian institutions. True, this may be inconvenient for prosecution. But our Government is not one of mere convenience or efficiency. It too has a stake, with every citizen, in his being afforded our historic individual protections, including those surrounding criminal trials. About them we dare not become careless or complacent when that fashion has become rampant over the earth.
>
> * * * * *
>
> "The dangers for transference of guilt from one to another across the line separating conspiracies, subconsciously or otherwise are so great that no one really can say prejudice to substantial right has not taken place."

The Kotteakos Court saw as its job the justification of sections 269 and 557 of the Criminal Code which latter section permitted the joinder, in separate counts of the same indictment, different "acts or transactions of the same class of crimes" (at page 1252). There alone one is given enough light to see the misjoinder in the instant case. How can Taylor's transaction be considered the same class of crime as any of the other co-defendants and especially the New York conspirators?

The Kotteakos Court provides in its opinion a provision that the test for misjoinder be applied more and more stringently as the indictments become larger and larger. At page 1253 the Court states:

> "That offense is perhaps not greatly different from others when the scheme charged is tight and the number involved is small. But as it is broadened to include more and more, in varying degrees of attachment to the confederation, the possibilities for miscarriage of justice to particular individuals becomes greater and greater."

Taylor is the particular individual in the instant case whose substantial rights have suffered unconscionably from the misjoinder, substantial rights described in general by the Kotteakos Court as

> ". . . the right not to be tried 'en masse' for the conglomeration of distinct and separate offenses . . ." (at page 1253)

POINT VIII

THE TRIAL COURT ERRED IN DENYING DEFENDANTS' MOTIONS FOR MISTRIAL WHERE THE JURY ON AT LEAST FOUR OCCASIONS SAW DEFENDANT TAYLOR AND THREE OTHERS IN MANACLES.

The effect on the jury of seeing four of the defendants in manacles on at least four occasions (T. 2697, 2716, 3477; JA- 97,98,157) during the trial is left only to surmise at this point. Some indication of the effect can be seen in the fact that the four who were seen in manacles were convicted, whereas others such as Smith, Barber, Miller, Ferguson, and Tate who were seen daily roaming around the corridors on breaks and walking in the streets after court sessions were not convicted. The jury, many of them inexperienced, may have drawn some conclusions as to the relative danger of the defendants who had to be led back and forth in manacles. Nevertheless the trial court never "voir dired" the jurors in question to

determine whether or not they had been prejudiced; instead, the trial court denied the motions for mistrial (T. 2719, 3544; JA- 99, 164). In a shorter trial there would have been less at stake, and the motions for a mistrial might have been granted, but here there was too much time and money already spent. This is just another price the defendants in large conspiracy trials have to pay.

The principle that there is a presumption of innocence in favor of the accused is fundamental to the administration of our criminal law. Coffin v. United States, 156 U.S. 432, 453, 15 S.Ct. 394 (1895). "It necessarily follows that a criminal defendant is generally entitled to the physical indicia of innocence," Kennedy v. Cardwell, 487 F.2d 101, 104 (6th Cir., 1973).

United States v. Torres, 519 F.2d 723 (2nd Cir. 1975); United States v. Sperling, 362 F. Supp. 909 (DC NY 1973); United States v. Larkin, 417 F.2d 617 (1st Cir. 1969) held that a mistrial was inappropriate where the manacled defendant had been seen only once by the jurors and where the trial court had conducted a voir dire of the jurors. In Torres one alternate who said that her judgment might have been affected was excused. In Sperling, one of the jurors was excused. In Larkin the jurors were questioned and none felt that they were prejudiced and so none were excused.

Our case can be distinguished from the above mentioned cases where a mistrial was not warranted: (a) in our case there

were multiple exposures to a number of jurors; (b) in our case there was no voir dire to determine whether the jurors had been prejudiced, and (c) in our case the exposure might have heightened the problem created by the factional conspiracies. It may have been assumed that Taylor was among the worst of the offenders because he was still in custody and therefore convicted. Ironically, all those co-defendants who did well enough in their line of work to afford private counsel and/or bail were not convicted.

This prejudice could not be remedied by the line or two buried in the trial court's charge. By then the damage was done; the impression was created. The trial court erred in failing to grant the defendant's motion for a mistrial.

FURTHER

The Defendant-Appellant Taylor adopts the arguments of co-appellants as his own on the law.

CONCLUSION

The judgment of conviction of the Defendant-Appellant Taylor should be reversed.

Respectfully submitted,

JOHN A. CIAMPA

Attorney for Appellant
Al Taylor

2 Copies Received

Date 9/8/76

Firm Hon. Robert B Fiske U.S. Atty.

By IKowalski
Crim Clk Office